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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 831

STELLA T. RAMBO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court appear in the record at pages 46–57. The opinion of the Circuit Court of Appeals (R. 169–172) is reported in 145 F. 2d 670.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944 (R. 172). The petition for a writ of certiorari was filed on January 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25), which confers jurisdiction on the district courts "of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants", authorizes suit against the United States where it is in possession of land under a claim of exclusive title.

STATUTE INVOLVED

Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25), provides:

The District Courts shall have original jurisdiction as follows:

> Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

STATEMENT

This partition suit was instituted in April 1941 against the United States and others under Section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25) (R. 10–18). All of the land here involved formerly belonged to the Kennesaw Mountain Battlefield Association and had been deeded in trust to the Atlanta Trust Company in

1924 to secure certain bonds issued by the Association (R. 32, 48, 77–89). In 1927, a default in interest payments having occurred, the Superior Court for Cobb County, Georgia, at the request of two bondholders and the Atlanta Trust Company, appointed receivers (R. 48, 89–106). On October 11, 1927, the Atlanta Trust Company was granted a decree of foreclosure and the trustees were directed to retain possession of the premises "subject to such further order as the Court may enter" (R. 107).

Thereafter, the receivership remained in effect (R. 26, 50; see R. 108–115). However, no action was taken by the state court, the trustee, or the receivers to sell the property until March 1935 when the receivers sought and received permission from the court to negotiate for the sale of the property to the United States (R. 111; see also R. 112–115). In February 1936 they obtained permission to reject the Government's offer of purchase (R. 115–118).

On May 28, 1936, the United States instituted proceedings to condemn the land (R. 128–132). In that proceeding service was obtained upon, among others, the Kennesaw Mountain Battlefield Association; the receivers; the Atlanta Trust Company, trustee; William Tate Holland, individually and as President of the Kennesaw Mountain Battlefield Association; and E. D. C. Hames, one of the plaintiffs in the foreclosure proceedings, as

representative of the bondholders (R. 133–135). Petitioners here, who were also bondholders, were not personally served (cf. R. 26).

The receivers, pursuant to state court authority, appeared and defended the condemnation proceedings (R. 118–128, 140–142). Holland, individually, and as president of the Association, purporting to represent a large majority of the outstanding bondholders, also appeared and participated (R. 138–140). A jury trial was had and a verdict was returned in the sum of $9,000 (R. 142) which the court increased by additum to $16,000 (R. 143–144). An appeal was taken by both parties to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the $16,000 judgment. *United States* v. *Kennesaw Mountain Battlefield Association,* 99 F. 2d 830 (1938). The Association and the receivers then unsuccessfully petitioned this Court for a writ of certiorari. 306 U. S. 646.

On May 8, 1939, judgment was entered on the mandate of the Circuit Court of Appeals, and on May 19, 1939, the Government having deposited the amount of the award, final judgment was entered vesting title in the United States (R. 152–153). On June 10, 1939, four of the bondholders, who are the principal claimants in the present proceeding, filed a petition for leave to intervene on the grounds that they had not been individually served in the condemnation action, and that as

part owners or tenants in common, they were entitled to be heard on the assessment of damages. The trial court refused to grant the petition to intervene, and the Circuit Court of Appeals affirmed on the ground that the denial of intervention was within the sound discretion of the trial court since, if they were owners and not represented in the condemnation proceeding, the judgment would not be binding on them. The court pointed out that the bondholders seeking to intervene did not allege or contend they had no knowledge of the condemnation proceedings, that although they lived in the same town where notice was published and appeared to be closely identified with Holland, who took an active part in the proceedings, they sat by during the trial and waited until two appeals had been taken, judgment entered and the award paid into court before asserting their alleged rights. The court also stated that it was "impressed with the argument that the intervenors here were fully and fairly represented [by the state court receivers and the trustees for the bondholders] in the original suit filed by the government to condemn the lands in question." *Rambo* v. *United States,* 117 F. 2d 792, 794 (1941).

Relying on 28 U. S. C. 41 (25), plaintiffs thereupon brought the present proceeding to "partition" the land which the Government had condemned. Their suit was based upon the claim that

the foreclosure decree in the state court (R. 107) was a "strict foreclosure" resulting in a dry trust so that title immediately passed to them as bondholders by virtue of what the trial court characterized as a "very doubtful application of the statute of uses" (cf. R. 52, 53; Pet. 3, 10; see also *Rambo* v. *United States*, 117 F. 2d 792, 793). Therefore, since they were not served individually on the condemnation proceeding, it was urged that they were not divested of their title by the judgment in those proceedings and that the United States acquired title only to the interests of those bondholders who were individually served, thus becoming a tenant in common with petitioners (R. 52).[1]

A motion to dismiss was filed by the United States on May 9, 1941, on the ground that the complaint failed to state a claim against the defendant upon which the relief prayed for could be granted (R. 19). On June 5, 1941, the parties stipulated that the land involved in the present case was the same land included in the earlier condemnation proceedings, that since June 7, 1939, the United States "claims to have been in the actual, exclusive, adverse, notorious and uninterrupted posses-

[1] Petitioners state that the United States contends that they were served by service of notice on one of the bondholders as a representative of a class and by publication of notice, giving the impression that these are the only contentions of the Government (See Pet. 3, 11). The Government has also contended, however, that petitioners were represented in the condemnation proceeding by the receivers and the trustee. (See R. 52; see also *Rambo* v. *United States*, 117 F. 2d 792).

sion of said land," that the United States had incorporated the land into the Kennesaw Mountain National Battlefield Park administered by the National Park Service, that the United States had placed warning signs on the land stating it was "United States Government Property," and that no one has attempted in any way to interfere with its possession and use of the land (R. 25–31). Subsequently, the United States filed a supplemental motion to dismiss the petition upon the ground that the court had no jurisdiction of the action (R. 19–22).

The motions for dismissal were overruled by the court on December 5, 1941, the trial judge being of the view that the petition raised factual issues which could be decided only on motion for summary judgment (cf. R. 47). Such a motion was thereupon filed, along with an answer challenging the court's jurisdiction and asserting that the issues were *res judicata* (R. 22–25). On October 29, 1943, the court dismissed the bill "for want of equity and lack of jurisdiction" (R. 46–56).

Upon appeal the Circuit Court of Appeals affirmed, holding that the United States has not by virtue of section 24, paragraph 25 of the Judicial Code, 28 U. S. C. 41 (25) consented to try the title to land claimed by it in a suit to partition where the plaintiff is not in possession and his claim of title is denied.

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ARGUMENT

Suits against the United States, or against property of the United States, cannot be maintained in the absence of consent by Congress. *Minnesota* v. *United States,* 305 U. S. 382, 386–387; *United States* v. *Shaw,* 309 U. S. 495, 500. Section 24, paragraph 25 of the Judicial Code, relied on by petitioners as giving such consent (Pet. 2, 13), confers jurisdiction on the district courts of "suits in equity" for "partition" by a "tenant in common or joint tenant" of land so held by the United States. While these words are not defined in the statute it is well-settled that "language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Merriam,* 263 U. S. 179, 187. The phrase "suits in equity" is elwhere used in the Judicial Code, having originally been employed in the Judiciary Act of 1789. See 28 U. S. C. sec. 41 (1). The equity jurisdiction thus conferred on the inferior federal courts is that exercised by the High Court of Chancery of England at the time of the separation of the two countries. *Matthews* v. *Rodgers,* 284 U. S. 521, 529; *Atlas Ins. Co.* v. *Southern, Inc.,* 306 U. S. 563, 568; cf. *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 164–165; *Gay* v. *Parpart,* 106 U. S. 679, 689; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 280. And the principle is equally

settled that statutes relaxing sovereign immunity from suit must not be liberally construed. *United States* v. *Sherwood,* 312 U. S. 584, 590; *United States* v. *Michel,* 282 U. S. 656, 659 (1931).

Applying these rules of construction, Section 24 paragraph 25 of the Judicial Code does not confer jurisdiction on the district court (1) because at common law a disseised co-tenant may not bring a writ of partition, and (2) because at common law the plaintiff in an equity partition suit must have a clear legal title.

1. The fundamental and common feature of all forms of cotenancy is unity of possession. I Tiffany, *Real Property* (2d ed. 1920), p. 626. "The refusal to let a cotenant into possession, with knowledge of his claim of title, accompanied by a denial thereof, constitutes an ouster." *Id.,* p. 673. No bill in equity for partition can be maintained by a plaintiff who has been "ousted," and who is not in possession with the other alleged co-tenants. *Hipp* v. *Babin,* 19 How. 271, 279; *Sanders* v. *Devereux,* 60 Fed. 311 (C. C. A. 8); *Frey* v. *Willoughby,* 63 Fed. 865 (C. C. A. 8); *Rich* v. *Bray,* 37 Fed. 273, 277 (C. C. W. D. Mo.); *Holton* v. *Guinn,* 65 Fed. 450, 454 (C. C. W. D. Mo.); *Bearden* v. *Benner,* 120 Fed. 690, 693 (C. C. S. D. Ga.). The rule is well summarized in *Rich* v. *Bray, supra,* where the court said (p. 277):

> * * * Where there is an adverse holding under claim of exclusive right, amount-

> ing to an ouster among tenants in common, it destroys the unity of possession, and takes away the right of partition. Resort must first be had to the action of ejectment at law.

The record in this case shows that the Government claims the exclusive ownership of this property (R. 23), and that "the United States had been in continuous and adverse possession of the land" since May 19, 1939 (R. 47–48), "claiming the entire title" (R. 55). The record further shows that the Government has incorporated this land into the Kennesaw Mountain Battlefield Park, that improvements have been made thereon, and that signs have been erected declaring this land to be "United States Government property" (R. 28–30). These acts clearly amount to an ouster, and thus preclude a suit for partition.

2. In the High Court of Chancery of England and in the federal courts the scope and purpose of a suit in equity for partition has historically been limited to the division among the parties of land in which they had legal interests or estates that were not in controvery. *Guy* v. *Parpart,* 106 U. S. 679, 689; *Lessee of McCall* v. *Carpenter,* 18 How. 297, 302; Clark v. Roller 199 U. S. 541, 545; *Bearden* v *Benner,* 120 Fed. 690, 693 (C. C. S. D. Ga.); *Sanders* v. *Devereux,* 60 Fed. 311 (C. C. A. 8); *Frey* v. *Willoughby,* 63 Fed. 865 (C. C. A. 8); *Holton* v. *Guinn,* 65 Fed. 450, 454 (C. C. W. D. Mo.); *Brown* v. *Cranberry*

Iron & Coal Co., 72 Fed. 96, 98 (C. C. A. 4); *Chapin* v. *Sears*, 18 Fed. 814 (C. C. N. J.).

If a plaintiff's title was not recognized by the alleged co-tenants, it was necessary to have a determination of that issue prior to partition. In *Clark* v. *Roller*, 199 U. S. 541, this Court said (p. 545):

> So far as general principles go we certainly should not reverse the decision of the Court of Appeals that the petitioners ought to establish their title at law before partition should be decreed. * * * "A bill for partition cannot be made the means of trying a disputed title."

This rule has been somewhat relaxed by statute or decision in many states, and questions of title arising incidentally in a suit for partition can now often be tried in the partition proceedings.[2] But the question of title is not an incidental one in this case; petitioners' purpose in bringing this suit is to establish their claim to an interest in the land here involved (cf. R. 13). As the court below said (R. 170), "Regardless * * * of what plaintiffs may call their action, it is one primarily

[2] State legislation and judicial decisions broadening the scope of partition suits in equity are inapplicable in partition proceedings in the federal courts. *Matthews* v. *Rodgers*, 284 U. S. 521, 529; *Sanders* v. *Devereux*, 60 Fed. 311, 314–315 (C. C. A. 8); *Frey* v. *Willoughby*, 63 Fed. 865, 867 (C. C. A. 8). Otherwise the jurisdiction of the federal court over suits against the United States would vary from state to state and the liability of the United States to suit would depend upon the vagaries of state legislation.

to contest with the United States its title to, and its exclusive possession of, the lands involved. It is a suit to try title with partition as an incident, to be decreed only if and when the plaintiffs succeed in establishing in them a title superior to that of the United States." Such a proceeding is not one to which Congress consented in enacting section 24, paragraph 25 of the Judicial Code. It follows, therefore, that the suit was rightly dismissed for want of jurisdiction.

CONCLUSION

The question presented was correctly decided by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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